STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2001B046

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FRANK L. SALAZAR,

Complainant,

VS.

DEPARTMENT OF HUMAN SERVICES, COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,

Respondent.

Hearing was held on January 18, 2001, before Administrative Law Judge Kristin F. Rozansky at the offices of the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Stacy L. Worthington represented Respondent. Robert L. Jansen of Koncilja & Koncilja represented Complainant.

MATTER APPEALED

Complainant, Frank L. Salazar ("Complainant" or "Salazar"), appeals his termination by Respondent Department of Human Services, Colorado Mental Health Institute at Pueblo ("Respondent" or "CMHIP").

For the reasons set forth below, Respondent's action is **affirmed**.

PRELIMINARY MATTERS

Assistant Attorney General Stacy L. Worthington represented Respondent. Susan Fosdick, Nutrition Services Director for Respondent was Respondent's Advisory Witness for the proceedings.

Complainant was represented by Robert L. Jansen of Koncilja & Koncilja. Complainant and his counsel were present via telephone for the evidentiary proceedings.

PROCEDURAL MATTERS

A. Witnesses

Respondent called Susan Fosdick, Nutrition Services Director for CMHIP.

Complainant testified on his own behalf.

B. Exhibits

Respondent's Exhibits 1, 3 to 7, and 16 to 18 were admitted by stipulation.

C. Telephone Conferencing and Testimony

At the time set for commencement of the hearing, only Respondent's counsel and Respondent's Advisory Witness were present in the hearing room. When Complainant and his counsel did not appear at the appointed time for the hearing, the Board called counsel's offices. Robert Jansen, counsel for the Complainant, was placed on speakerphone in the hearing room and moved for continuance of the hearing. As grounds for the continuance, Jansen informed the ALJ that Complainant and Respondent had been engaged in settlement discussions two weeks prior to the hearing. Jansen was under the impression that, due to the settlement discussions, the hearing would not take place. At no time, prior to the hearing date, did Jansen or counsel for the Respondent contact the Board and/or file a motion to vacate or continue the hearing date. The motion was denied for failure to show good cause. The parties stipulated to the Complainant and his counsel being present via telephone conferencing from the offices of Complainant's counsel.

ISSUES

- 1. Whether Complainant committed the acts for which he was disciplined;
- 2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
- 3. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
- 4. Whether attorney fees are warranted.

FINDINGS OF FACT

- 1. Frank Salazar was an Equipment Operator in the Nutrition Services section at CMHIP when he was terminated on October 13, 2000.
- 2. Salazar was originally hired in August 1998 as a Vehicle Driver with a subsequent change in his classification to Equipment Operator.
- Salazar's commercial driver's license was revoked on September 18, 2000. Exhibit
- 4. When Salazar applied for his position, the minimum requirements were posted in the announcement.
- 5. Those minimum requirements were "[a]pplicants must possess and maintain a current valid Type B CDL Colorado Driver's license. Prefer applicants with food service background." Exhibit 4.
- 6. Salazar's job duties include working as a relief operator, filling in for the other two drivers in the Nutrition Services section on their days off.
- 7. Salazar worked as a relief operator four days each week (eighty percent of the work week).
- 8. When acting as a relief operator, Salazar loaded items onto a refrigerated truck at the main kitchen, drove to one of eleven locations, unloaded the truck, reloaded it and returned to the kitchen.
- 9. For safety reasons, it was necessary to transport the food in a refrigerated truck.
- 10. A commercial driver's license is required to drive a refrigerated truck.
- 11. CMHIP has no time studies of the amount of time Salazar spent actually driving on those four days, but throughout each of those four days he drove to various locations, often to the same location twice in one day.
- 12. Salazar's relief operator duties require intermittent driving throughout the day. It is not possible to complete all of the driving in one portion of the day and spend the rest of the day loading and unloading items onto the truck for delivery.
- 13. Salazar spent the fifth day of each workweek at the main kitchen loading and

unloading items.

- 14. Susan Fosdick is the Director of Nutrition Services at CMHIP.
- 15. As the Director of Nutrition Services, Fosdick has been delegated appointing authority and oversees 106 employees who provide food service for 1400 clients.
- 16. On August 2, 2000, as required by statute, Salazar told Fosdick that he had been arrested on July 31, 2000, with a blood alcohol level of 0.216.
- 17. Fosdick discussed the matter with various CMHIP personnel and decided not to take any kind of disciplinary action against Salazar until final action was taken against his license.
- 18. On September 20, 2000, Salazar told Fosdick that his license had been revoked.
- 19. On October 4, 2000, Fosdick held an R-6-10 meeting with Salazar and Jim Nylund from DHS' Personnel Office present. Exhibit 18.
- 20. At that meeting, Salazar said that his driver's license, including his commercial driver designation, was suspended until December 17, 2000, for driving while under the influence of alcohol. Exhibit 18.
- 21. During the meeting, Fosdick expressed concerns about Salazar's absenteeism and chronic tardiness. Exhibit 18.
- 22. Salazar's tardiness is the subject of two written warnings and received a score of "zero" on his May 2000 performance evaluation. Exhibits 6, 7 and 17.
- 23. Overall Salazar received performance evaluations of "fully competent" in June 1999 and May 2000. Exhibits 16 and 17.
- 24. The May 2000 performance evaluation contained mathematical errors on the overall score, but the rating of "fully competent" was not changed. Exhibit 17.
- 25. Salazar stated that he and his wife were experiencing a great deal of stress in their personal lives, including raising his three stepchildren. Exhibit 18.
- 26. At the end of the meeting, Fosdick asked Salazar to give her a copy of the document that would tell her that he would have his license reinstated in three months. She stated that the document would make a big difference in her decision as to any action taken against him, based upon how long his license would be suspended. Exhibit 18.

- 27. The day after the R-6-10 meeting, Salazar provided Fosdick with a copy of the order revoking his license.
- 28. The Order of Revocations states that Salazar's license is revoked until December 17, 2000, and shall continue in effect until §42-2-132, C.R.S., is complied with, required insurance is filed and a reinstatement fee is paid. It also states that Salazar is prohibited from driving while under the restraint. Exhibit 3.
- 29. Any vehicle that Salazar would have driven at CMHIP would have been insured under an insurance issued to the state.
- 30. After the R-6-10 meeting, Fosdick concluded that Salazar would <u>not</u> be able to perform eighty percent of his duties, those duties comprising his work as a relief driver four days a week. She concluded he would <u>only</u> be able to perform twenty percent of his job duties those duties he fulfilled one day a week loading and unloading the trucks at the main kitchen.
- 31. Fosdick considered alternatives to terminating Salazar, including placing him in vacant positions and having him cover other employees' duties while they were on vacation.
- 32. The only available vacancy was a position with a lower classification. However, that position required intermittent driving for items that had been forgotten during the various deliveries and pickups.
- 33. Fosdick did not discuss the vacant position with Salazar because it required intermittent driving.
- 34. For approximately one month after his license was revoked and prior to the R-6-10 meeting, Salazar worked one day a week loading and unloading items in the main kitchen. He also provided vacation relief for a food service worker.
- 35. During that one-month period, another CMHIP employee, Eric Brammell, who held a commercial driver's license, covered Salazar's relief operator duties, including the driving duties.
- 36. Brammell was in a lower classified position than Salazar.
- 37. While Brammell covered Salazar's relief operator job duties, they were each paid at their old salary rates, rather than the salary rates for the jobs that they were covering.
- 38. Fosdick terminated Salazar because a commercial driver's license is a minimum qualification for the Equipment Operator/Vehicle Driver position. Exhibit 1.

- 39. In addition, Fosdick terminated Salazar because there was, at a minimum, another two months remaining on his license revocation and she needed someone who was able to fulfill the driving portion of his job duties.
- 40. Fosdick was concerned that Salazar might violate the conditions of reinstatement of his license that would result in his license revocation continuing beyond December 17, 2000. She was not aware of any reasons why Salazar would violate any of the conditions of reinstatement.
- 41. Salazar's driver's license, including his commercial driver's license designation, was fully reinstated.
- 42. In the past, two employees under Fosdick's supervision have lost their licenses. Those employees' jobs entailed little or no driving. One of those employees was promoted within his classification before CMHIP made a decision about any possible disciplinary action.
- 43. Complainant seeks reinstatement, with back pay and benefits, and attorney fees.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be terminated for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Just cause is outlined in Board Rule R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire

record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. McPeck v. Colorado Department of Social Services, 919 P.2d 942 (Colo. App. 1996).

II. <u>HEARING ISSUES</u>

A. Complainant committed the acts for which he was disciplined.

Complainant's driver's license, including his commercial driver's license designation, was revoked. Respondent presented a copy of the Order of Revocation (Exhibit 3). Complainant did not argue or present any evidence refuting the revocation of his license. Complainant committed the act for which he was disciplined.

B. The Appointing Authority's action was within the range of reasonable alternatives.

The crux of this case is whether terminating Salazar was within the range of reasonable alternatives available to the appointing authority. Appointing authorities are to subject employees to corrective action <u>before</u> disciplinary action. Board Rule R-6-2, 4 CCR 801 (1999). An exception to this rule is if the employee's act warrants immediate disciplinary action. Board Rule R-6-2, 4 CCR 801 (1999). An appointing authority's decision to take any type of action must be based on the nature, extent, seriousness, and effect of the act. Board Rule R-6-6, 4 CCR 801 (1999). One reason for discipline is the inability to perform the job. Board Rule R-6-9(4), 4 CCR 801 (1999).

Respondent testified that she considered alternatives to terminating Complainant, including other vacancies and vacation relief duty. However, there were no vacant positions for which Complainant was qualified and which did not entail driving. For one month after Complainant's license was revoked, Respondent employed Complainant in non-driving positions as a vacation relief worker. The difficulty was that Complainant's job driving duties also had to be covered. Applying Board Rule R-6-6, the effect of Complainant's act was his inability to perform the job duties of eighty percent of his position. Respondent needed those job duties fulfilled. Therefore, on a temporary basis, it had another employee cover Salazar's driving duties. That employee received no additional wages and Complainant's salary was not reduced commensurate with his reduction in job duties. If Respondent had suspended Complainant until such a time as his license was reinstated, Respondent would still have been faced with the difficulty of juggling Complainant's job duties among other employees.

For one month the Respondent tried to continue to employ Complainant. Respondent considered alternatives to termination. However, as set forth above, those alternatives were not feasible in this particular case. Therefore, the appointing authority's termination of Respondent was within the reasonable range of alternatives.

C. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

Once Complainant's driver's license was revoked, he no longer fulfilled one of the minimum qualifications for his position, albeit temporarily. Under Board Rules, the inability to perform the job is a basis for discipline. Board Rule R-6-9(4). Complainant was on notice when he was employed that a commercial driver's license was a minimum qualification for his position. The announcement for the position stated that applicants "must possess and maintain a current valid Type B CDL Colorado Driver's license." Anyone not having such a license would not have been considered for the position. Complainant failed to maintain such a license. In addition, Complainant has provided no legal authority for the proposition that Respondent had a duty to continue to juggle Complainant's job duties until such a time as his license was reinstated

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S., and Board Rule R-8-38, 4 CCR 801.

Given the above findings of fact an award of attorney fees is not warranted. Both sides provided competent evidence in litigating the action.

CONCLUSIONS OF LAW

- 1. Complainant committed the acts for which he was disciplined.
- 2. The discipline imposed was within the range of reasonable alternatives.
- 3. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
- 4. Attorney fees are not warranted.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this	day of February, 2001.	

Kristin F. Rozansky Administrative Law Judge 1120 Lincoln Street, Suite 1420

Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66,4CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the	_day of February, 200)1, I placed true co	pies of the	foregoing
INITIAL DECISION OF ADMIN	NISTRATIVE LAW .	JUDGE and NO	TICE OF A	APPEAL
RIGHTS in the United States ma	ail, postage prepaid,	addressed as follo	ows:	

Robert L. Jansen Koncilja & Koncilja 125 West B Street Pueblo, Colorado 81002

and in the interagency mail, to:

Stacy L. Worthington Assistant Attorney General Employment Law Section 1525 Sherman Street, 7th Floor Denver, Colorado 80203